THE PROBLEM OF AN INDEPENDENT NATIONAL AUDIT

The present system of national audit is based upon the so-called Dockery Act of July 31, 1894.[1] It was enacted as a result of the investigation and report of the joint commission of Congress appointed in 1893. This Act reorganized the auditing and accounting system and established the office of the Comptroller of the Treasury, the Division of Bookkeeping and Warrants in the Treasury Department, and prescribed the duties of the six auditors.

The practice under this Act and its amendments may be described briefly as follows: Each of the six auditors is an independent officer appointed and removable by the President. They are regarded as "presidential officers" and have customarily been associated with patronage in the civil service. They usually lose their offices with the change of party control over the government.[2] Each one of these auditors has jurisdiction over the accounts of a designated number of departments or establishments. His audit is final unless an appeal is taken from his decision or unless the Comptroller of the Treasury has bound the auditor by making an advance decision.

The Comptroller of the Treasury while having relations with the auditors does not have control over them. An appeal can be taken to him from the decision of any auditor, in which event his decision is final. He can also, upon application being made to him by the disbursing officer of any department, render a decision as to the legality of an expenditure in advance of the disbursement, which decision binds both the disbursing officer and the respective auditor as regards the final audit.[3]

[1] Twenty-eight Stat. L., p. 205.

[2] See Register of the Treasury for past years; also statement of Comptroller of the Treasury in House Hearings on National Budget System, 66th Cong., 1st sess., p. 239.

[3] Sec. 8, Dockery Act.

Each auditor has under him a considerable personnel, many of whom are engaged in routine clerical work which can properly be classified under the category of accounting. The appropriation act for these services for the fiscal year ending June 30, 1919, provided for 1,141 employees at a total cost to the government of $1,543,000 not including the auditing of the accounts abroad.[1]

The audited accounts are not made public or laid before Congress, nor do the annual reports of the six auditors show exactly what the audit of the accounts revealed. They show that a large amount of routine work has been done by way of checking up vouchers, writing letters, etc., but they furnish no basis for criticism of the spending departments or of the accounting system.

There has been under way in this country for some time a movement for an independent national audit as a part of a national budget system. Advocates of this idea criticize the present system of auditing as being based upon a wrong principle. The function of audit is independent criticism. It is no part of the duties of an auditor to keep accounts or to be involved in the routine of accounting. He is fundamentally a critic of the officer keeping the accounts. He brings to bear upon the spending and record-keeping officers a review from the outside. He represents the fund granting authority as distinguished from the fund spending authority.

We have never had in the government of the United States a system of audit which made a scientific distinction between accounting and auditing. The President, who is at the head of the executive government and who controls the executive officers, controls also the auditors, and furthermore the auditors are required to do a considerable portion of accounting. They are even regarded as accounting officers of the Treasury Department.[2] The executive, therefore, is in the position of auditing his own accounts. In the very nature of the question this cannot be an audit. It is an administrative examination. Scientifically speaking we have at present no system of national audit.

[1] See House Doc. 1006, 65th Cong., 2d sess., Plan for a National Budget System, p. 30. (Submitted by the Hon. Medill McCormick.)

[2] See statement by Secretary Glass, House Hearings on a National Budget System, 66th Cong., 1st sess., p. 491.

There is, however, no intention here to suggest that the existing officers charged with the duty of audit have not performed their tasks faithfully and efficiently. There has been no criticism along these lines. The criticism is directed at the system and is intended to improve it by strengthening the control of Congress over the expenditure of public moneys.

The purpose of accounting is twofold. First, to furnish to the public a record of the financial transactions of the officers of the government charged with the responsibility of spending the public moneys and, second, to keep a check on the disbursing officer by way of seeing that he is faithful in the discharge of his duties. This is done through a system of bookkeeping which gives this information to the public on the one hand and furnishes on the other hand a basis for the exercise of the critical functions of audit. It is quite clear, therefore, that the auditor should be entirely independent of the accounting officer and of the person who controls the accounting officer.

It is proposed in plans now before Congress to remedy this situation by the creation of a system of independent audit, that is to say independent of the executive branch of the government. This involves the creation of the office of Auditor General of the United States, who would take over the auditing functions now exercised by the six auditors and the Comptroller of the Treasury. The Auditor General is designed to be a great and powerful officer of state. It is proposed that he be paid a salary commensurate with the dignity of his office and that he should have no administrative superior in the government service. He is to be the critic, so far as financial regularity is concerned, of the administration. Although not a part of the legislative branch of the government he is to be in a sense the strong arm of Congress to reach out into all of the various spending offices of the government to bring to light any facts which might show that the letter or spirit of the appropriation laws have been violated in their execution.

The question of the appointment of this officer, however, presents a very serious difficulty. Theoretically, he should be appointed by the legislative branch of the government for the reason that he is to be the interpreter of the acts of Congress, in so

far as they relate to public finance, and the critic of the executive branch in executing these acts. But can Congress appoint him? Under the Constitution[1] it is provided that the President

> shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for and which shall be established by law; but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

This provision is quite clear on the point that only the President can appoint an officer of the United States.[2]

The Constitution expressly provides that each House of Congress shall have the power to appoint its own officers,[3] but no provision is made for the appointment of a joint officer or officers. It is clearly, therefore, the intention of the framers of the Constitution to exclude Congress from the appointment of officers of the United States. An officer appointed by either House of Congress would hold office for the term of the Congress, and no permanent staff of officers can be thus appointed who would hold office longer than a term of two years. It is true that Congress can appoint a joint committee and that committee can employ persons to work for it. It has been suggested that perhaps the audit staff could be put under the control of Congress in this manner. The objections to this scheme are that the position of the Auditor General would be lacking in permanency and dignity, and not being an officer of the United States it is doubtful if he could make a legal audit. He could investigate and report, but the powers which it is desired to give to the proposed Auditor General are distinctly those which are to be exercised by an officer of the United States. The further fact that the audit staff would be limited to the life of the Congress appointing the joint committee raises an objection serious enough to vitiate the whole scheme, since there would be no escape from

[1] Art. 2, Sec. 2.

[2] See *U.S.* v. *Germaine*, 99 U.S. 508; and *U.S.* v. *Mouat*, 124 U.S. 303, for a definition of the term "officer of the United States."

[3] Constitution, Art. 1, Sec. 2.

throwing the appointment of the new audit staff open to patronage with the coming of each new Congress.

The Select Committee of the House on the Budget struggled with this proposition at the hearings and finally reported a bill[1] placing the appointment of the Auditor General in the hands of the President. The bill introduced by Senator McCormick establishing an independent audit[2] makes the appointment of the Auditor General effective through a concurrent resolution of both Houses of Congress. Such a resolution, it will be remembered, does not require the signature of the President. For reasons above referred to the provision in the McCormick bill does little more than to express an ideal. In reintroducing his National Budget Bill,[3] Senator McCormick deferred action on the audit question on the ground that further investigation would be necessary before an effective audit bill could be drafted.

After viewing the question from many angles it seems that there can be no system of independent audit in this country, along the lines suggested in proposed legislation without a constitutional amendment, since the power of appointment by the executive of his chief critic creates a serious doubt, theoretically at least, of his independence, especially when considered in connection with the tenure of office.

Both of the foregoing bills referred to give Congress the power to remove the Auditor General. This raises another constitutional problem. The Constitution provides that judges "shall hold their offices during good behavior"[4] and they cannot therefore be removed from office by the President, but other officers of the United States may be removed by the President at any time even though Congress should fix the term of office. The Constitution is silent on the question but Congress has from early times sanctioned the view that the President possesses the power to remove from office any officer whom he, alone or "by and with the advice and consent of the Senate," appoints. The only exceptions to this are the two

[1] H.R. 9783, 66th Cong., 1st sess., Oct. 7, 1919.

[2] S. 450, 66th Cong., 1st sess., May 20, 1919.

[3] S. 3476, 66th Cong., 2d sess., Dec. 2, 1919.

[4] Art. 3, Sec. 1.

tenure of office acts, 1867 and 1869, which attempted to restrict the President in this respect, but these acts were never enforced and are now generally regarded as having been unconstitutional.[1] They were repealed in 1886. This question has never been presented squarely to the Supreme Court in all of its relations, but several cases have been decided upholding the general proposition of the power of the President to remove.[2] In other words it seems that the Constitution intended that the power of removal should follow the power of appointment, and such has been the general practice. Advocates of an independent national audit are desirous of placing the Auditor General in the category with the judges, giving him a tenure during good behavior with retirement privileges, and this has been embodied in the bills recently introduced in Congress. There seems, however, to be no escape from the conclusion that such an officer must not only be appointed by the President but may also be removed by the President at his discretion. The Constitution, therefore, is fundamentally at variance with the needs involved in this proposed reform.

The expenditures of the federal government will never recede to the low level of the years prior to our entry into the Great War. It is doubtful that we shall spend less than five billions a year in the future. Vast sums of money must be raised by taxation from the American people. In the expenditure of this money for governmental purposes Congress feels very strongly the need for a closer control over the various spending departments. Our present system was built up at a time when our revenues exceeded our needs and when the question of federal taxation was not a problem at all. The federal government has now grown into a vast agency for spending money. Advocates of a national budget system are practically unanimous on the point that one of the strongest and most effective methods of criticism and control over expenditures can be obtained by establishing the auditing system of the government on a basis independent of the executive. The Constitution, however, stands in the way of any such independence

[1] See Willoughby, *The Constitutional Law of the United States*, Vol. II, 1181–82.

[2] See *ex parte* Hennen, 13 Pet. 230; *Parsons* v. *U.S.*, 167 U.S. 324; *Shurtleff* v. *U.S.*, 189 U.S. 311.

of the audit office. It is quite possible, however, that a president may exercise the greatest respect for the difficulties of the situation, appoint a strong Auditor General and leave him to work independently under instructions from Congress. It would be a bold executive indeed who would exercise the power of removal of this great officer of state for criticizing any financial irregularities of his administration. The psychological situation, however, is quite different when the Auditor General knows that he is under no obligation to the executive for his appointment and has no fear of being removed by him. The fact that no Auditor General created by Congress could ever enjoy this state of mind seems to be a serious defect in the proposed system.

In 1866, under the leadership of Mr. Gladstone, Parliament passed the Exchequer and Audit Departments Act[1] which took away the auditing functions of the Treasury and established an independent audit under a Comptroller and Auditor General. It is true he is appointed by the Crown, but he can be removed from office only by an address from both Houses of Parliament. For more than fifty years this Act has been in force practically without amendment and it is held in the highest esteem. It has been often called the cornerstone of the British financial system. A fifty-year review of the work of the British audit office was recently published by the Committee of Public Accounts of the House of Commons[2] and an appreciation of the work of this office, especially during the war period, was given by several members of Parliament in open discussion on October 24, 1916.[3]

In view of the apparent insurmountable difficulties in the way of establishing a system of independent audit along the lines of the British system it may be well to turn to other countries for further study. In all other countries than our own the struggle for revenues to meet expenditures has necessitated the development of very efficient systems of control. This has been necessary in order to preserve the national credit. Special emphasis has been placed upon the matter of audit and of the consideration of the accounts by the legislature after the money has been spent with a view,

[1] 29 and 30 Vict., chap. 39, June 28, 1866. [2] 1st and 2d Reports, Aug. 8, 1916.

[3] *Parliamentary Debates*, House of Commons, v. 86, no. 99, pp. 1001 ff.

in the first place, of informing themselves as to how the public money appropriated was spent; second, with a view of keeping a check upon the individual spending officers; and, third, with a view of improving the system of budgetary procedure.

The French have, especially at times, regarded the question of audit with extreme seriousness. For several centuries prior to the adoption of their present system they had a periodical audit by a special tribunal as a result of which many officers were hanged or sent to the guillotine. Sometimes the torture chamber was used to bring out the facts necessary for the audit.[1] The law of September 16, 1807, established the French Court of Accounts (Cour des Comptes), according to the idea of Napoleon I. This court, which ranks next to the highest court in France, has remained practically as originally constituted up to the present time. It is a highly organized body and exercises the function of independent audit over all of the expenditures of the government. It has 135 members including accountants, referees, auditors, and attorneys. The audit which it makes is entirely on an a posteriori or a so-called postmortem audit. That is to say, the audit is made after the accounts are closed. The court reports to the legislative branch of the government.[2] The French system of audit through an independent judicial body was followed, with certain adjustments, by Prussia, Germany, Austria-Hungary, and others, that is to say a court of accounts with powers only of postmortem audit.

The Belgian law of October 27, 1846, established a court of accounts with the powers and duties of the French court but added to it the additional authority to pass upon the legality of all expenditures before the disbursement of the money. The Belgian court, therefore, has administrative functions as well as judicial. No voucher can be honored by the Treasury unless it shows the visé of the Cour des Comptes.[3]

The Belgian system has been followed by Holland, Portugal, Japan, Italy, and some other countries. The Italian Court of

[1] See Stourm, *Le Budget*, 7e éd., pp. 533 ff.

[2] For a full description of the organization, procedure, and value of the Cour des Comptes see Stourm, *op. cit.*, 7e éd., C. 28; Leroy Beaulieu, *La Science des Finances*, Tome Second, 7e éd., pp. 155 ff; Allix, *Traité Élémentaire de Science des Finances et de Législation Financière Française*, 3e éd., C. 29; Jèze, *Cours Élémentaire de Science des Finances et de Législation Financière Française*, 5e éd., pp. 349 ff.

[3] See Stourm, *op. cit.*, pp. 505 ff.

Accounts (Corte dei Conti), which was established by the law of August 14, 1862, has gone farther in the matter of control over expenditures than either the French or the Belgian. It is a very live and active body. It exercises the function of independent audit and is not limited to the postmortem phase. It makes a continuous audit and reports monthly to the legislature. It also passes upon the legality of all expenditures prior to disbursement. The members of the Italian court, like those of the court of accounts in other countries, are appointed by the executive upon the nomination of the ministry and hold office during good behavior. They cannot be removed by the executive.[1]

In view of the fact that we have a Court of Claims[2] which is connected, though somewhat remotely, with the question of audit might it not be possible for us to convert the Court of Claims into a Court of Accounts? When a claim against the government is finally audited and the claimant, having no right of appeal from the decision of the Auditor after it has been upheld by the Comptroller of the Treasury, is dissatisfied he may bring suit in the Court of Claims and gain a further hearing of his case. If the Court of Claims were enlarged to take over the judicial functions now exercised by the Comptroller of the Treasury and in addition there were attached to the Court a force of auditors for the purpose of making an independent and direct audit of the government accounts we would have something analogous to the court of accounts system generally in vogue on the Continent. It would not be necessary to disturb the existing audit system, which we have seen is not really an audit but an administrative examination, otherwise than to consolidate their work under the immediate control of the Treasury.

This would give Congress an independent audit of the accounts and the auditing force would be beyond the reach of the executive in the same sense that the federal judges, including the Supreme Court, are now beyond his power of removal or interference.

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[1] For a discussion and description of the Italian Corte dei Conti, see Flora, *Scienza delle Finanze*, 5th ed., pp. 77 ff.; Nitti, *Scienza delle Finanze*, 4th ed., pp. 935 ff.; especially note, pp. 938–39; Lorini, *Scienza delle Finanze*, 2d ed., pp. 463 ff.

[2] Established by Act of Congress Feb. 24, 1855, 10 Stat. L. 612.